

Proposed First Nations Drinking Water and Wastewater Act
Yukon First Nations Considerations



Prepared for:
Assembly of First Nations (Yukon Region)

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Disclaimer. The contents contained in this document do not reflect the position of Yukon First Nations, or any individual First Nation, and should therefore not be considered a consultation document. This document was developed for information purposes as part of the Assembly of First Nations engagement process to inform the development and application of the proposed federal law titled “*First Nations Drinking Water and Wastewater Act*”.

1. Introduction

Yukon First Nations recognize that the development of the proposed federal bill titled “*First Nations Drinking Water and Wastewater Act*” (February 2023) (the “proposed law”) was in response to the drinking water crisis on reserves highlighted in [Safe Drinking Water Class Action Settlement Agreement](#) (December 2021); to which the Government of Canada repealed the 2013 *Safe Drinking Water for First Nations Act* on June 23, 2022 and began working with First Nations rights holders to develop a new law for First Nations drinking water and wastewater management¹.

The purpose of this paper is to examine the proposed law through a Yukon First Nation lens and provide comments and considerations highlighting the benefits and limitations of the federal statute; and demonstrate where self-governing Yukon First Nations have rights, title, interests and authorities to address the access, use and management of water, inclusive of surface and ground water.

2. The Yukon and Yukon First Nations

The Yukon

The land mass in the Yukon is approximately 482,000 square kilometers. There are 43,000 residents in the Yukon; 25% of the population are Indigenous; and 21,000 Yukoners live in the City of Whitehorse.

Yukon Waters

Eight thousand square kilometers of the Yukon territory is covered in water. There are six major watersheds in the Yukon: the Alsek, Yukon, Porcupine (which drains to the Yukon River in Alaska), Peel (which drains to the McKenzie Delta), Liard (which drains to the McKenzie Basin through British Columbia, Alberta and North West Territories) and North Slope. Each watershed branches into rivers and streams. There are wetlands in the Yukon and the largest measured at approximately 6,000 square kilometers located on Old Crow Flats. The Yukon has extensive groundwater resources and frozen water sources: glaciers and permafrost. There are an estimated 1,396 glaciers that cover approximately 10,000 square kilometers of the Yukon land mass².

Drinking water in the Yukon is either delivered to the communities by piped conveyance systems or trucks. Public drinking water systems are also subject to routine sampling and testing for chemical parameters and bacteria as is required by the *Drinking Water Regulation* under the *Public Health and Safety Act (RSY 2002)*. In addition to the Yukon Water Board, governed by the

¹ December 20, 2021 The Federal Court and the Court of Queen's Bench of Manitoba issued a joint decision approving an agreement to settle class-action litigation related to safe drinking water in First Nations communities. The class action was led by representative plaintiffs Tataskweyak Cree Nation, Curve Lake First Nation and Neskantaga First Nation. The terms of the settlement agreement were previously announced on July 30, 2021, and included \$1.5 billion in compensation for individuals deprived of clean drinking water; the creation of a \$400 million First Nation Economic and Cultural Restoration Fund; a renewed commitment to Canada's Action Plan for the lifting of all long-term drinking water advisories; the creation of a First Nations Advisory Committee on Safe Drinking Water; support for First Nations to develop their own safe drinking water by-laws and initiatives; a commitment of at least \$6 billion to support reliable access to safe drinking water on reserves; and the planned modernization of Canada's First Nations drinking water legislation.

² “Water for Nature, Water for People: Yukon Water Strategy and Action Plan” (2014).

Water's Act (SY 2003), the Yukon Government departments of Environment; Energy Mines and Resources; Health and Social Services; Community Services; and Highways and Public Works and are collectively responsible to ensure Yukoners have access to safe drinking water.

'The majority of Yukoners rely on groundwater for their domestic needs with the exception of communities like Carcross and Marsh Lake who use a treatment plan to supply surface water. As well there are rural communities and residents who may have their own groundwater wells'³.

Research shows that the Yukon Government is working with First Nations in the areas of ground and surface water monitoring with the interest to ensure adequate water monitoring across the Yukon and enhance the best available science, traditional and local knowledge in decision making⁴.

Yukon First Nations

When considering water, it is important to think about all that water contributes to, such as fish and wildlife, wetlands, consumption and hygiene; and the sources of water: ground water (aquifer), surface water (lake or river) and rainfall, which has climate change and environmental considerations.

The Yukon is home to 14 First Nations representing 8 language groups - Hän, Gwitchin, Southern Tutchone, Northern Tutchone, Tlingit, Tagish, Kaska and Upper Tanana. Eleven of the 14 Yukon First Nations are self-governing with their aboriginal rights, title to land and authorities recognized and confirmed pursuant to their First Nation Final and Self-Government Agreements, negotiated with the Governments of Canada and Yukon in accordance with the Yukon First Nation Umbrella Final Agreement (1995).

Self-Governing Yukon First Nations and jurisdiction in relation to Water

To examine the access and use of water for drinking and wastewater management purposes it is important for Yukon First Nations to take a holistic view of their relationship to water, along with their rights, title and interests with water.

In accordance with the Yukon Final Agreements self-governing Yukon First Nations' rights to water include: use and protection of water on Settlement Lands (which is land where Aboriginal Title is secured); use for trapping and non-commercial harvesting; as well as heritage, cultural and traditional use⁵. Further self-governing Yukon First Nations own water that is equated to portions of a Bed of a lake, river or other waterbody that is located within their Settlement Lands; but they do not own the water when the Bed of a waterbody is not enclosed by Settlement Land, unless the water rights are recognized and expressed in their respective Yukon First Nation Final Agreement. As well self-governing Yukon First Nations have the general right to have no change in the quality, quantity and rate of flow of Water, which is on, or flowing through or adjacent to its Settlement Land⁶. Similarly self-governing Yukon First Nations have a responsibility not to change the quality, quantity or rate of flow of Water that is on, flowing through or adjacent to Settlement Land.

³ *Ibid.*, @ p.17.

⁴ "Yukon Water Strategy: Five Year Report" (2019).

⁵ See Chapter 14 of the Final Agreement, titled Water Management.

⁶ These rights are grounded in and protected by section 35(1) and 35(3) of the *Constitution Act, 1982*.



There are three types of Settlement Land: Category A where the First Nation has complete ownership of surface and subsurface rights; Category B where the First Nation rights has ownership of the surface equivalent to Fee Simple but does not own the subsurface but can use gravel, clay and other Specified Substances without payment of royalties to the Government; and Fee Simple where the First Nation has surveyed and registered in the Yukon land titles office.

There is view that self-governing Yukon First Nations own the surface and ground water located on Category A Settlement Land and therefore can legislate for the purpose to access and use the source water, for example drilling of groundwater wells.

Self-governing Yukon First Nations can enact laws to affirm and manage their water rights and to protect the water quality, quantity and rate of flow of waters on or adjacent to their Settlement Lands.

In accordance with 13.1 and 13.3 of the Self-Government Agreements self-governing Yukon First Nations have the jurisdiction to enact laws to address the use, management, administration and protection of natural resources under their ownership, control or jurisdiction as well for the prevention of pollution and the protection of the environment.

In particular section 13.1.2 and 13.3 of the Kwanlin Dün First Nation Self-Government Agreements provide:

13.1 The Kwanlin Dün First Nation shall have the exclusive power to enact laws in relation to the following matters:

...

13.1.2 management and administration of rights or benefits which are realized pursuant to the Final Agreement by persons enrolled under the Final Agreement and which are to be controlled by the Kwanlin Dün First Nation;

[Specific to the enactment of laws on Settlement Lands]:

13.3 The Kwanlin Dün First Nation shall have the power to enact laws of a local or private nature on Settlement Land in relation to the following matters:

13.3.3 use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Kwanlin Dün First Nation;

...

13.2.19 control or prohibition of any activities, conditions or undertakings that constitute or may constitute a danger to public health;

13.3.20 control or prohibition of pollution and protection of the environment.

Should a self-governing Yukon First Nation choose to enact its own law to manage the access and use of water on their Settlement Lands, the First Nation would be required to Consult (as defined by the Yukon Final Agreement) with the Yukon Government in accordance with the Yukon Self-Government Agreements. In particular section 13.5.5 states:

13.5.5 Where the Kwanlin Dün First Nation reasonably foresees that a law which it intends to enact may have an impact on a Yukon Law of General Application, the Kwanlin Dün First Nation shall Consult with the Yukon before enacting the law.

Other measures within the Yukon Final Agreements which promote co-governance over water management include the establishment of bodies such as Watershed Management Working Groups⁷ in accordance with Chapter 14 and the development of regional land use plans in accordance with Chapter 11.

Chapter 11 of the Yukon Final Agreements provides for the development of regional land use plans to:

- 11.1.1.2 minimize actual or potential land use conflicts both within Settlement Land and Non-Settlement Land and between Settlement Land and Non- Settlement Land;
- 11.1.1.3 to recognize and promote the cultural values of Yukon Indian People;
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- 11.1.1.6 to ensure that social, cultural, economic and environmental policies are applied to the management, protection and use of land, **water** and resources in an integrated and coordinated manner so as to ensure Sustainable Development.

Land Use plans are important for the protection of surface and groundwater sources on Settlement Land that can be impacted by off Settlement Land water use activities such as agriculture and mining and also provides for the protection of aboriginal rights and interests within a First Nation's traditional territory. In particular a review of the Peel Watershed Land Use Plan (2019) (informed by the Supreme Court of Canada decision in *Nacho Nyak Dun v. Yukon* SCC 58, 2017) identifies specific environmental, social and economic goals which includes maintaining the quantity, quality and rate of flow of water within its natural range.

3. The proposed law

The proposed law is progressive and has the potential to strengthen federal relations with First Nations, particularly First Nations located on section 91(24) reserve lands, on a critical issue such as access to safe drinking water.

The key features of the proposed law set out to:

- ensure that First Nations have reliable access to sufficient adequate and safe quantity and quality of drinking water;
- reliable access to effective treatment and disposal of waste water to assist First Nations to achieve the highest attainable standard of health, safety and wellbeing;
- affirm the inherent right of self-government which includes jurisdiction in relation to drinking water, wastewater and infrastructure on First Nation lands;
- support the enactment of First Nations laws to govern drinking water, wastewater and related infrastructure on First Nation lands;

⁷ Section 14.6.2 of the Yukon Final Agreements for the Kwanlin Dün First Nation, Carcross/Tagish First Nation and the Ta'an Kwäch'än Council provide for the establishment of a Yukon River Watershed Management Working Group to provide recommendations and coordinate efforts to improve the health of water and shorelines and protect freshwater fish and salmon and their habitat.

- ensure that laws in relation to water services on First Nation lands are consistent with section 35 of the *Constitution Act*, 1982 and the United Declaration on the Rights of Indigenous Peoples⁸;
- ensure that the Charter of Rights and Freedoms, 1982 (the “Charter”) would apply to a First Nation governing body should they enact a law to exercise their jurisdiction;
- establish minimum national standards for the provision of water services on First Nation lands and a federal regulatory regime respecting those services;
- provides for fiscal arrangements to support the application of a First Nation law on First Nation lands;
- establishment of a First Nations Water Commission, based on consultation with First Nations, to be formed as a not-for-profit corporation, to support the purpose and principles of the proposed law; and
- facilitate collaboration between First Nation and the federal, provincial and municipal governments through transboundary source water protection planning and entering into agreements to protect source water.

4. Yukon First Nation considerations

Regardless of the water resources in the Yukon access to safe drinking water and proper waste management infrastructure is a leading concern for all Yukon First Nation communities.

With the exception of Kwanlin Dün First Nation and in part the Ta’an Kwäch’än Council which are located within the City of Whitehorse, the majority of First Nations have their drinking water transported by truck and stored in holding tanks. Yukon First Nations echo that access to drinking water, in the rural communities, comes at a high cost; the holding tanks are outdated (contributing to the ongoing concern that their water is unsafe for drinking and hygiene); and there are limited resources to respond to increasing water infrastructure needs.

Application of the proposed law to Yukon First Nations

Yukon Self-Government Agreements provide that Laws of General Application, inclusive of federal and territorial laws, will apply to self-governing First Nations, their citizens and their Settlement Lands. Specifically, as set out in the Kwanlin Dün First Nation Self-Government Agreement it states:

- 13.5.1 Unless otherwise provided in this Agreement, all Laws of General Application shall continue to apply to the Kwanlin Dün First Nation, its Citizens and Settlement Land.

The proposed law is not a Law of General Application because it is intended to deal specifically with First Nations and First Nation lands that are defined as “Class 24 of section 91 of the Constitution Act, 1867, and does not apply to lands where Aboriginal title is claimed by a First Nation or has been confirmed by a court”⁹.

⁸ Articles 25,26 and 29 of the United Declaration on the Rights of Indigenous Peoples are of particular importance which recognize Indigenous People’s right to: maintain and strengthen their distinctive spiritual relationship with their lands, territories, water and coastal seas and other resources; own, use and develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation; and to the conservation and the protection of the environment.

⁹ First Nation Lands is defined under section 2 of the proposed law.

The proposed law would apply to those Yukon First Nations without a Final Agreement located on section 91(24) reserve lands, which provides the federal obligation to ensure that the non-self-governing Yukon First Nations have reliable access to sufficient adequate and safe quantity and quality of drinking water as well as access to effective treatment and disposal of waste water to achieve the highest attainable standard of health, safety and wellbeing. Further should a non-self-governing Yukon First Nation choose to enact its own law in accordance with the proposed law they could access federal monies to realize their water related legislative objectives.

There are some circumstances where the proposed law could apply to Yukon First Nations with Final Agreements, such as Teslin Tlingit Council and Kwanlin Dün First Nation who have retained section 91(24) reserve lands in addition to their Settlement Lands.

Those self-governing Yukon First Nations who have retained section 91(24) reserve lands could enact a statute in accordance with the terms of the proposed law for the purpose of such lands; however, the application of the Charter is highly problematic and contrary to the long standing views expressed by Yukon First Nations, such as Teslin Tlingit Council who appear as an intervenor in the Yukon Court of Appeal of *Dickson v. Vuntut Gwitchin* to advance the position that the Charter does not and should not apply to self-governing Yukon First Nation laws or institutions unless the First Nation chooses to negotiate its application¹⁰.

5. Closing Considerations

In summary the proposed law would not apply to self-governing Yukon First Nations and their Settlement Lands but would apply in a Yukon context to those non-self-governing Yukon First Nation located on section 91(24) reserve lands and in some cases 91(24) reserve lands retained by self-governing Yukon First Nations.

The proposed laws and its recognition of the inherent right to self-governing which includes jurisdiction over drinking water and wastewater management; alignment of laws with the United Nations Declaration on the Rights of Indigenous Peoples; and federal support for realization of First Nation legislative objectives of providing access to clean drinking water and infrastructure in response to a First Nation's needs and assessments is critical to improve the health and wellbeing of First Nation families. However, a Yukon First Nation government, with or without a Final Agreement, would need to weigh the benefits provided under the proposed law against the limitations of having their First Nation institution and law subject to the Charter.

For self-governing Yukon First Nations their Final and Self-Government Agreements provide for the recognition of their rights, ownership, management and regulation of water. However, there are financial challenges specific to providing access to safe drinking water and treatment of wastewater. For some self-governing Yukon First Nations there is value in the proposed law's principles - to ensure First Nation access to clean and safe drinking water and effective treatment and disposal of wastewater – which can advance federal fiscal policies that inform the financial transfer agreement negotiations on issues such as housing and community services infrastructure, which are linked to providing Yukon First Nation families and citizens access to safe drinking water.

¹⁰ Dickson appealed the Yukon Court of Appeal decision and Vuntut Gwitchin cross appealed. The matter was heard before the Supreme Court of Canada on February 7, 2023. The decision is still pending.